ARAB-MALAYSIAN CREDIT BHD

v.

DOMINANCE RESOURCES SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-70-1999]
28 FEBRUARY 2001

CIVIL PROCEDURE: *Summary judgment - Delay in application - Whether a ground per se for defeating plaintiff's application - Whether defendant showed bona fide triable issues - Explanation for delay - Whether acceptable*

CONSTITUTIONAL LAW: *Courts - Stare decisis - High Court - Whether to follow decisions of Court of Appeal - Whether bound to follow decisions of highest court (Federal/Supreme Court)*

The plaintiff granted financing to the first defendant to purchase some equipment ('the equipment'). It entered into a hire purchase agreement and a deed of guarantee and indemnity with the first and second defendants as hirer and guarantor respectively.

On 28 September 1999, the plaintiff commenced an action claiming that the first and second defendants had breached their respective obligations under the hire purchase agreement and the deed of guarantee and indemnity. On 25 October 1999 the defendants entered an appearance and on 22 November 1999 filed their respective defences. Various defences were raised.

Five and a half months after the defendants had filed their defences, the plaintiff filed its application for summary judgment. The reason for the delay according to the plaintiff was because they were waiting for approval from their headquarters on the course of action to take as recommended by their solicitors.

The defendants raised the preliminary objection that the plaintiff's delay was inexplicable and inordinate and therefore its application for summary judgment should be refused. The defendants submitted that the delay alone was sufficient to defeat the plaintiff's application.

The plaintiff argued that it had already explained the reasons for the delay and, secondly, that even if the court was not satisfied with the explanation offered, there were no *bona fide* triable issues raised in the defence.

The issue for consideration here was whether the High Court was bound by the decision of the former Supreme Court or the decision of the current Court of Appeal on the issue of whether mere delay on the part of a plaintiff is a sufficient ground to dismiss an application for summary judgment.

Held:

[1a] The doctrine of *stare decisis* requires that the High Court should loyally follow the decisions of the Court of Appeal just as the Court of Appeal is required to follow the decisions of the Federal Court.

[1b] This High Court is not at liberty to follow the decisions of the former Supreme Court but must instead loyally follow the decisions of the Court of Appeal because if the Court of Appeal has transgressed by not loyally following an earlier decision of the Supreme Court, then only the Federal Court can overrule the Court of Appeal.

[2] The defendants had not addressed the court on whether the defences raised *bona fide* triable issues. Since delay *per se* would not defeat the plaintiff's application, the preliminary objection must fail.

[3] Even if the delay alone was a sufficient reason to defeat the application for summary judgment, the plaintiff had explained the delay. Such explanation was acceptable since it is not unusual that a plaintiff should want to consider first what is stated in the defence before embarking on a summary procedure.

[Preliminary objection dismissed.]

Case(s) referred to:

Abdul Manaf Mohd Ghows v. Nusantara Timur Sdn Bhd [1994] 2 CLJ 379 ***(dist)***

Bank Industri Malaysia Bhd v. Accent Technology Sdn Bhd & Anor (Civil Suit No: D5-22-1030-92) ***(dist)***

Cassel & Co v. Broome & Anor [1972] AC 1027 ***(foll)***

Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 ***(foll)***

In re United Railways of Havana and Regla Warehouses Ltd [1961] AC 1007 ***(refd)***

Krishnamurthy & Anor v. Malayan Finance Corpn Bhd [1986] 1 CLJ 541 ***(refd)***

McLardy v. Slateum [1890] 24 QBD 504 ***(refd)***

Miliangos v. George Frank (Textiles) Ltd [1975] 2 WLR 555 ***(foll)***

Perkapalan Shamelin Jaya Sdn Bhd v. Alpine Bulk Transport New York [1998] 1 CLJ 424 ***(foll)***

Schorsch Meier GmbH v. Hennin [1974] 3 WLR 823 ***(refd)***

Standard Chartered Bank Malaysia Bhd v. Eng Song Huat [1996] 2 CLJ 714 ***(dist)***

Yap Mong Siew & Ors v. Leong Hum [1998] 3 CLJ 513 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 1

For the plaintiff - Kilat Beriak; M/s Chew, Jugah, Wan Ullok & Co
For the defendants - Anthony Ting; M/s Anthony Ting & Co

Reported by Mariette Peters-Goh

JUDGMENT

Clement Skinner J:

This ruling is delivered in response to a preliminary objection taken by the defendants on the hearing of the plaintiff's application for summary judgment against them under O. 14 r. 1 Rules of the High Court 1980 ('the RHC'). In fact three objections were taken but counsel abandoned two of them.

The remaining objection is that the plaintiff had delayed for some 5 1/2 months after the defendants had filed their respective defences before moving the court for summary judgment. To sustain their objection, the defendants rely on the decision in *Krishnamurthy & Anor. v. Malayan Finance Corporation Berhad* [1986] 1 CLJ 541, where the Supreme Court held that an application for summary judgment may be made either before or after the delivery of a defence provided that where it is made after the delivery of a defence, the plaintiff must explain the delay; if the explanation is not accepted by the court, no O. 14 judgment could be granted. The defendants say the plaintiff's delay is inexplicable and inordinate by reason whereof the plaintiff's application should be dismissed in limine. The defendants take the stand that delay alone is sufficient to defeat the plaintiff's application and have not addressed me on whether their defences raise any *bona fide* triable issues.

The very brief facts leading to the plaintiff's application are tese. The plaintiff granted financing to the 1st defendant to purchase one unit of equipment described as a Roller and Continuous Dryer (hereafter 'the equipment'). For this purpose, they entered into a hire-purchase agreement on 28 March 1998. After making adjustments for a down payment and various other charges, the balance of the hire-purchase price payable was RM2,970,000 which the 1st defendant undertook to pay by sixty (60) monthly rentals of RM49,500 each commencing from 28 April 1998. On 28 March 1998, the 2nd defendant signed a deed of guarantee and indemnity in favour of the plaintiff in respect of the hire-purchase agreement entered into between the plaintiff and the 1st defendant.

On 28 September 1999, the plaintiff commenced this action, claiming that the 1st and 2nd defendants had breached their respective obligations under the hire-purchase agreement and deed of guarantee and indemnity.

On 25 October 1999, the defendants entered an appearance herein and on 22 November 1999, filed their respective defences. Various defences were raised. The 1st defendant said the hire-purchase agreement was unenforceable – it was a fictitious agreement or alternatively, a money lending transaction, it was also said to be illegal, null and void as it charged an exorbitant and unconscionable rate of interest, and, claimed interest upon interest. It was also said that the plaintiff did not have proper title or ownership of the said equipment when the agreement was entered into, that no proper demand had been made prior to the commencement of this action and that the plaintiff had failed to mitigate its losses by taking possession of the said equipment. The 2nd defendant raised the same defences as the 1st defendant but also went on to allege that he is not liable as a guarantor as the plaintiff had misrepresented to him that he was entering into a guarantee and not an indemnity agreement.

Some 5 1/2 months after the defendants had filed their defences, the plaintiff, on 9 May 2000, filed its application for summary judgment.

It is safe to infer that the plaintiff knew that because it was making its application after the defendants had delivered their defences, it was obliged to give an explanation for the delay because when it filed its application, it gave an explanation for the delay in the affidavit of Remus ak. Chabang filed in support of the application and affirmed on 24 April 2000. In para 27 thereof, he explained that the plaintiff had waited for the defendants to file their defence because the plaintiff was not sure whether the defendants would do so. When the defendants did do so, the plaintiff was advised by its solicitors that the defences did not raise any *bona fide* triable issues and that the plaintiff should apply for summary judgment. On being so advised, Remus ak. Chabang contacted his headquarters to seek their approval for the plaintiff to take the course recommended by its solicitors. It was only when approval was obtained that the application for summary judgment was prepared and filed.

Learned counsel for the plaintiff met the preliminary objection in two ways: First, he said that if the court were to apply the law as stated by the Supreme Court in *Krishnamurth*y's case, – which the defendants urge me to, – the plaintiff has discharged the onus on it by the explanation provided through Remus ak. Chabang. Second, even if the court was not satisfied with, and hence, did not accept, the explanation offered by the plaintiff, all was not lost for the plaintiff because in a decision handed down in 1997, the Court of Appeal took the opportunity of declaring that delay *per se*, in moving the court

under O. 14, would not defeat an application for summary judgment where there are no *bona fide* triable issues raised in a defence; to rule otherwise ran counter to the interests of justice; That is what the Court of Appeal said in *Perkapalan Shamelin Jaya Sdn. Bhd. v. Alpine Bulk Transport New York* [1998] 1 CLJ 424, and, according to counsel, if that statement of the law is given effect to, the preliminary objection of the defendants is bound to fail.

Faced with the above submission, counsel for the defendants urged me not to follow the decision of the Court of Appeal in *Perkapalan Shamelin*. He said that case was wrongly decided – the Court of Appeal had got it wrong – their decision is inconsistent with a long line of authorities starting with the English case of *McLardy v. Slateum* [1890] 24 QBD 504 itself, which our courts, including the then Supreme Court, have cited in support of the proposition that where an application for summary judgment is made after a defence is delivered, the plaintiff must explain the delay in applying.

Counsel for the defendants concluded by saying that with the Court of Appeal's decision in *Perkapalan Shamelin*, there are now differing decisions from appellate courts of different levels but that I am bound by the doctrine of *stare decisis* to give precedence to the decision of an apex court, namely, of the Supreme Court in *Krishnamurthy*'s case over that of the Court of Appeal in *Shamelin*'s case.

Since the defendants have taken the stand that delay *per se*, will defeat the plaintiff's application for summary judgment and that the law governing this point is what was stated in *Krishnamurthy*'s case which I am bound by the doctrine of *stare decisis* to give precedence to over the decision in *Perkapalan Shamelin*, I feel I should address this point first (which is the second point taken by counsel for the plaintiff) as it will effectively decide the preliminary objection.

Having given the submissions of counsel for the defendants my most anxious consideration, I have, with respect, come to the conclusion that I should follow and apply the law as stated in *Perkapalan Shamelin*. And I have done so on the basis that the doctrine of *stare decisis* requires that a High Court should loyally follow a decision of the Court of Appeal just as the Court of Appeal is required to do of a decision of the Federal Court. In *Co-operative Central Bank Ltd. (In receivership) v. Feyen Development Sdn. Bhd*. [1997] 3 CLJ 365, the Federal Court endorsed fully and declared as applicable to our jurisdiction what Lord Hailsham LC said in *Cassel & Co. Ltd. v. Broome & Anor*. [1972] AC 1027 about the binding effect of judicial decisions of an apex court on courts below it. In that case, Lord Hailsham LC speaking of the English courts had said:

> The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co. Ltd.* [1944] 1 KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

The situation that I am faced with here is this: In *Perkapalan Shamelin*, the Court of Appeal, having referred to and considered what was said about delay in several cases, including what was said in *McLardy v. Slateum* and by the Supreme Court in *Krishnamurthy*'s case, felt it was open to them to decide as they did. Where they have done so, am I entitled to question their considered decision on the point and say that the Court of Appeal had got it wrong and therefore I should follow the earlier decision of the Supreme Court? In my judgment, I am not at liberty to take that course but must instead loyally follow the decision of the Court of Appeal because if the Court of Appeal had got it wrong and had transgressed by not loyally following the earlier decision of the Supreme Court in *Krishnamurthy*, then only the Federal Court can overrule such decision.

I find support for what I say in *Miliangos v. George Frank (Textiles) Ltd.* [1975] 2 WLR 555. That was a case in which an English company bought polyester yarn from a producer in Switzerland. They entered into an agreement in which the price was expressed in Swiss francs and payment was to be in Swiss francs. When the English buyer did not pay for the yarn, the Swiss seller brought two actions in England (later consolidated) claiming the price of the goods sold and delivered under the contract or alternatively on two bills of exchange accepted by the English buyer but dishonoured on presentation. The prayer in the statement of claim quantified the amounts due in sterling at 41,972 being the conversion from Swiss francs at the exchange rate on the date when payment fell due under the contract. The Swiss seller claimed the sums due in Swiss francs converted to sterling because for some 350 years it had been assumed in decision after decision of the English Courts including the House of Lords that money judgments in the courts in England could only be expressed in terms of sterling and not in terms of any foreign currency.

The English buyer initially put up defences to the actions but later agreed to submit to judgment. Just before judgment could be entered, the English Court of Appeal delivered a judgment in the case of *Schorsch Meier G.m.b.H. v. Hennin* [1974] 3 WLR 823 in which the Court of Appeal (Lord Denning M.R., Lawton LJ and Foster J) held unanimously that the rule that English courts could express their money judgments in sterling only did not apply to claims by nationals of one member state of the European Economic Community

against those of another member state by reason of the Treaty of Rome which had been made part of United Kingdom law. The Court of Appeal also decided by majority (Lord Denning MR and Foster J) that the rule should also be discarded and judgments given in foreign currencies where the foreign currency was the currency of the contract and the money of payment. Following the Court of Appeal decision in the *Schorsch Meier* case, the Swiss seller immediately applied to amend his statement of claim to claim in Swiss francs in the alternative to the claim in sterling. The amendment was allowed but the judge refused to allow judgment to be entered in Swiss francs. He gave judgment in sterling. He refused because he thought the *Schorsch Meier* case was wrongly decided and in conflict with a decision of the House of Lords in *In re United Railways of Havana and Regla Warehouses Ltd.* [1961] AC 1007 which bound him to express his judgment in sterling. This is what he said at p. 559:

> In this case I find myself in effect in the position of embarrassment foreseen by Lord Hailsham of St. Marylebone L.C. in *Broome v. Cassell & Co. Ltd.* [1972] AC 1027, 1054. I am faced with a judgment of a majority of the Court of Appeal, which in its application to the issue raised before me says that a rule of English law taken for granted by the Court of Appeal and the House of Lords for some 350 years is no longer a rule of English law.
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> The speeches of the House of Lords in *Broome*'s case [1972] AC 1027 constrain me in the circumstances to hold that the rule of law that my judgment can only be expressed in sterling is still of full force and effect, since Parliament has not altered it, nor has the House of Lords itself under its 1966 declaration: ...

The Swiss seller appealed against the decision. The Court of Appeal reversed the decision. In doing so, Lord Denning said the judge was wrong in not following the Court of Appeal's decision in the *Schorsch Meier* case because once the Court of Appeal had given its decision that an English court can give a judgment in a foreign currency, whether right or wrong, all lower courts should follow the decision unless and until it is reversed by the House of Lords. This is what his Lordship said at p. 564:

> In our system it is of the first importance that the decisions of the House of Lords should be loyally followed and applied by this court and all courts in all cases which they properly govern. In the *Schorsch Meier* case the majority thought that the *Havana* case did not govern the point: and that it was open to the courts to give judgment in foreign currency. Whether the majority were right in so holding, I would not presume to say. The House of Lords will tell us later. But whether right or wrong, it seems to me that once this court has given a decision upon it all lower courts should follow the decision of this court unless and until it is reversed by the House of Lords. In that way any embarrassment will be avoided.

Likewise in the matter before me, the Court of Appeal having decided in *Perkapalan Shamelin* that an application for summary judgment cannot be defeated solely on the ground that there has been delay in moving the court, I am bound to loyally follow that decision unless and until it is reversed by the Federal Court.

Returning to the point at hand, the defendants have not addressed me on whether their defences raise *bona fide* triable issues. Since delay *per se* would not defeat the plaintiff's application, this preliminary objection must fail.

If I am wrong in the view I have taken on the doctrine of *stare decisis* and I am required to follow the decision in *Krishnamurthy*, I now consider the first point taken by counsel for the plaintiff.

It is not disputed that the plaintiff waited for some 5 1/2 months after the defences were filed before moving the court for summary judgment. But in doing so, the plaintiff has offered an explanation for the delay.

The defendants say the delay of 5 1/2 months is inordinate and the explanation offered should be rejected as preposterous and implausible. To show that 5 1/2 months is an inordinate period of delay, counsel for the defendants referred me to several authorities: In *Abdul Manaf Mohd. bin Ghows v. Nusantara Timur Sdn. Bhd.* [1994] 2 CLJ 379, Anuar J (as his Lordship then was) dismissed an application for summary judgment made two months after the defence was filed. In *Standard Chartered Bank Malaysia Bhd. v. Eng Song Huat* [1996] 2 CLJ 714, Kamalanathan Ratnam JC (as his Lordship then was) also dismissed an application for summary judgment made two months after the defence was filed. In *Bank Industri Malaysia Berhad v. Accent Technology Sdn. Bhd. & Anor.* (Kuala Lumpur High Court Civil Suit No. D5-22-1030-92), Abdul Malek Ahmad J (as his Lordship then was) dismissed an application for summary judgment made a mere 20 days after the defence was filed.

I regret I did not find that the above cases advanced the defendants' case because a reading of them shows that in each, the court dismissed the application for summary judgment before it on the ground that no explanation was ever given by the plaintiff for moving the court after a defence had been filed and not because the court had found that the period of delay it was dealing with was inordinate. I should also point out that in *Yap Mong Siew & Ors. v. Leong Hum* [1998] 3 CLJ 513, the plaintiffs there delayed for about five months in filing their application for summary judgment after the defence had been filed. The explanation offered by the plaintiffs was that they wished to consider the defence before they embarked upon summary procedure. That explanation was quite acceptable to Kamalanathan Ratnam J.

Now, applying the principle stated in *Krishnamurthy*'s case, the question is: Is the plaintiff's explanation for the delay acceptable or is it to be rejected as being preposterous and implausible? I find the explanation acceptable. I find it quite acceptable that a plaintiff should want to see what is raised by way of a defence and receive his lawyer's advice thereon before embarking upon summary procedure. The following passage in *McLardy v. Slateum* itself provides an indication that it is not unusual that a plaintiff should want to consider first what is stated in a defence before embarking on summary procedure:

> The view taken by other judges, and by the masters, is that the intention of Ord. XIV, r.1, was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under Order XIV right and proper ...

Counsel for the defendants also ridiculed Remus ak. Chabang's explanation that he had to obtain prior approval from his headquarters before proceeding with the O. 14 application as far-fetched and inconceivable. With respect, I did not find that explanation so. Remus ak. Chabang explained that although the plaintiff here is Arab-Malaysian Credit Berhad, they had closed down their branch office in Sibu. Instead, the plaintiff has appointed Arab-Malaysian Finance Berhad whose registered office is at 22 Floor, Bangunan Arab-Malaysian, 55, Jalan Raja Chulan, Kuala Lumpur and which has a branch office in Sibu to act as its agent to, *inter alia*, collect debts for and on behalf of the plaintiff. Remus ak. Chabang is the manager of "Arab-Malaysian Finance Berhad, Sarawak Operation Hub". In the light of the above facts, I find the explanation of Remus about having to obtain prior approval from his headquarters acceptable. Consequently, I also find the plaintiff's explanation for the delay in filing its O. 14 application acceptable. On this ground also, I would dismiss the defendants' preliminary objection.

The defendants' preliminary objection is dismissed. I will hear counsel on the question of costs in respect of this preliminary objection.